

State of Maine

DEPARTMENT OF ATTORNEY GENERAL

MEMORANDUM

To: Board of Licensure in Medicine

From: Ruth E. McNiff, Assistant Attorney General

Date: November 7, 1995

Subject: Confidentiality

Any discussion of confidentiality with respect to the Board's records and proceedings must begin with the Freedom of Access Law, 1 M.R.S.A. § 401, et seq. (1989). The Declaration of Policy of the Freedom of Access Law states "that public proceedings exist to aid in the conduct of the people's business. It is the intent of the Legislature that their actions be taken openly and that the records of their actions be open to public inspection and their deliberations be conducted openly." The

statutory definition of "public records" is very broad and includes:

Any written, printed or graphic material or any mechanical or electronic data compilation from which information can be obtained, directly or after translation into a form susceptible of visual or oral comprehension, that is in the possession or custody of an agency or public official of this State or any of its public political subdivisions and has been received or prepared for use in connection with the transaction of public and governmental business or contains information relating to the transaction of public or governmental business
...."

1 M.R.S.A. § 402(3).

The Board of Licensure in Medicine is a public agency whose sole purpose, according to 10 M.R.S.A. § 8008, is "to protect the public health and welfare." The provisions of the Freedom of Access Law apply to the records, proceedings and information in the possession of the Board which has been received or prepared in connection with its public function, the licensing and disciplining of physicians. Therefore, all of the Board's records are presumed to be public records unless they

are specifically exempted. 1 M.R.S.A. § 402(3)(A-E) sets out five categories of exceptions to the public records definition. However, only two of these exceptions could apply to the Board's records:

- A. Records that have been designated confidential by statute;
- B. Records that would be within the scope of a privilege against discovery or use as evidence recognized by the courts of this State in civil or criminal trials if the records or inspection thereof were sought in the course of a criminal proceeding.

The privileges recognized by the courts as bars to discovery in civil or criminal proceedings include: attorney client communications, physician or psychotherapists' communications or records, interspousal communications, communications to a spiritual advisor, trade secrets, secrets of state and the right to refuse to self-incriminate. With the exception of medical or psychiatric records, there are very few privileged documents solicited or received by the Board which would be exempted under this statute. The exception which will be most relevant to this discussion is documents which are "designated confidential by statute."

Application Documents

Despite the fact that many of the records and documents involved in the licensing process are of a personal nature, most of these documents are not statutorily designated as confidential or privileged from discovery.